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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

MICHAEL BRIAN DASILVA,  
Plaintiff,  
v.  
PADILLA, et al.,  
Defendants.

Case No.: 14-cv-2442-WQH-MDD

**REPORT AND  
RECOMMENDATION OF  
UNITED STATES  
MAGISTRATE JUDGE RE:  
PARTIAL MOTION TO  
DISMISS FIRST AMENDED  
COMPLAINT**

**[ECF No. 37]**

This Report and Recommendation is submitted to United States District Judge William Q. Hayes pursuant to 28 U.S.C. § 636(b)(1) and Local Civil Rule 72.1(c) of the United States District Court for the Southern District of California.

1 For the reasons set forth herein, the Court **RECOMMENDS**  
 2 Defendants' Partial Motion to Dismiss be **GRANTED**.

3 **I. PROCEDURAL HISTORY**

4 **A. Federal Proceedings**

5 Plaintiff Michael Brian Dasilva ("Plaintiff") is a state prisoner  
 6 proceeding *pro se* and *in forma pauperis*. (ECF Nos. 1, 2). Plaintiff filed  
 7 the operative First Amended Complaint ("FAC") on April 28, 2015,  
 8 pursuant to 42 U.S.C. § 1983. (ECF Nos. 1, 35).

9 Plaintiff sets forth four interwoven federal claims alleging his  
 10 constitutional rights were violated when prison personnel: (1) interfered  
 11 with his access to the courts by withholding his legal mail for twenty-  
 12 eight days and transferring him in retaliation for filing grievances  
 13 against them; (2) interfered with his right to petition the government  
 14 for redress of grievances by refusing to process grievances and  
 15 retaliating against him for filing grievances; (3) violated his Due  
 16 Process rights by withholding legal mail, denying law library access,  
 17 obstructing the grievance process, destroying his property and  
 18 transferring him; and (4) engaged in retaliatory conduct against him for  
 19 utilizing the prison grievance process. (*Id.* at 12-16). In his fifth claim,  
 20 Plaintiff alleges Defendants' conduct also violated California state law,  
 21 and asks the Court to exercise supplemental jurisdiction over state law  
 22 claims challenging the same conduct. (*Id.* at 19 ¶ 60). Plaintiff alleges  
 23 this conduct led to \$287.32 worth of missing personal property not being  
 24 reimbursed and dismissal of his state tort case. (*Id.* at 16).

1 On May 12, 2015, Defendants filed a Partial Motion to Dismiss  
2 the FAC for Failure to State a Claim. (ECF No. 37). On June 1, 2015,  
3 Plaintiff filed a Response in Opposition. (ECF No. 41). On June 11,  
4 2015, Defendants filed a Reply. (ECF No. 42).

### 5 **B. State Court Proceedings**

6 Relevant to this Partial Motion to Dismiss is Plaintiff's closed civil  
7 state court case No. ECV07335, which proceeded in Imperial County  
8 Superior Court. (ECF No. 35 at 20). Plaintiff does not describe the  
9 dismissed state tort action as a criminal or civil rights case, but rather  
10 as a tort action for conversion. In that action, Plaintiff alleged  
11 defendants Lopez and Chavez lost his wedding ring and denied him  
12 reimbursement. (*Id.*).

13 In this action, Plaintiff alleges his withheld legal mail contained a  
14 "Motion to Transport Prisoner" that the Superior Court was returning  
15 to him to correct and re-file. (*Id.*). Plaintiff's tort case was dismissed  
16 for failure to appear on June 17, 2013, allegedly because Defendant  
17 Erece withheld his legal mail during the time his tort case was pending.  
18 (*Id.*). He alleges his mail was delivered to him on June 18, 2013, the  
19 day after his tort case was dismissed. (*Id.* at ¶¶ 7-8). Plaintiff does not  
20 name Lopez or Chavez as defendants in this action.

## 21 **II. STATEMENT OF FACTS**

### 22 **A. Background Facts**

23 All facts are taken from the FAC and are not to be construed as  
24 findings by the Court. Plaintiff claims he exhausted all administrative  
25 remedies available to him. (ECF No. 35 at 20).

1 On March 12, 2013, while Plaintiff was incarcerated at Centinela  
2 State Prison, Defendant Lieutenant Gervin interviewed Plaintiff  
3 regarding a Form 602 Appeal (“grievance”). (ECF No. 35 at 1, 5 ¶ 1).  
4 Plaintiff alleges Gervin was “extremely abrasive, hostile, and  
5 derogatory.” (*Id.*). Plaintiff claims Gervin belittled him. (*Id.* ¶ 2).  
6 Plaintiff said “Whatever dude,” to which Gervin responded “Aren’t you a  
7 disrespectful little bitch.” (*Id.*). A verbal altercation followed and the  
8 interview was terminated. (*Id.*).

9 Plaintiff met with Defendant Assistant Warden Calderon after the  
10 incident and reported Gervin’s behavior. (*Id.* ¶ 3). Calderon expressed  
11 concern about Gervin’s behavior and told Plaintiff he would handle the  
12 matter. (*Id.* ¶ 4). On March 18, 2013, Plaintiff received notice Gervin  
13 cancelled his grievance. (*Id.* ¶ 5). Plaintiff alleges the cancellation  
14 notice states Gervin cancelled his grievance because of Plaintiff’s  
15 behavior during the interview. (*Id.*). Plaintiff claims Gervin also filed a  
16 false report against him. (*Id.*). Plaintiff alleges Gervin took these  
17 actions “to dissuade Plaintiff from further using the grievance process.”  
18 (*Id.* at 13 ¶ 40).

19 Plaintiff spoke with Calderon two more times regarding Gervin’s  
20 conduct. (*Id.* at 5-6 ¶ 6). Additionally, Plaintiff filed a Form 22 Request  
21 for Interview (“Form 22”) and another grievance. (*Id.*).

22 Plaintiff claims that between May 21 and June 18, 2013,  
23 Defendants Erece and a Centinela State Prison mail room employee  
24 John Doe withheld Plaintiff’s legal mail concerning the tort case  
25 Plaintiff had pending in Imperial County Superior Court. (*Id.* at 6 ¶ 7).

1 Plaintiff claims the withholding of his legal mail caused him to miss his  
 2 court appearance on June 17, 2013, which resulted in an adverse  
 3 judgment against him. (*Id.* ¶ 8).

4 During the same time period, Plaintiff claims he had “Priority  
 5 Library Use Status,” because his state tort case was pending.<sup>1</sup> (*Id.* ¶ 9).  
 6 Plaintiff alleges that between May 17 and May 30, 2013, Defendant  
 7 Padilla refused to allow him access to the prison law library. (*Id.* ¶ 10).  
 8 On May 24, 2013, Plaintiff refused to return his morning food tray to  
 9 Padilla until Plaintiff spoke with his supervisor. (*Id.* at 7 ¶ 11). Padilla  
 10 refused and told Plaintiff to “Keep the f—ing tray.” (*Id.*). Plaintiff  
 11 claims this incident occurred two more times with no supervisor being  
 12 notified. (*Id.* ¶ 12).

13 On May 29, 2013, Plaintiff refused to return his “Hand Isolation  
 14 Devices.”<sup>2</sup> (*Id.* ¶ 13). Defendant Captain Greenwood was notified and  
 15 he asked Plaintiff to identify the officer who let him keep his food tray  
 16 because it posed a security risk. (*Id.* ¶ 14). Plaintiff identified Padilla.  
 17 (*Id.* ¶ 15). Plaintiff was transferred to a different cell and placed on  
 18  
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20 <sup>1</sup> Priority Library Use Status permits inmates with impending court  
 21 deadlines an additional two hours of library use a week as opposed to  
 22 the normally permitted single two hour session per week. (ECF Nos. 35  
 at ¶ 9; 37 at 8 n.1).

23 <sup>2</sup> Defendants explain “[a] Hand Isolation Device is used to restrict an  
 24 inmate’s ability to use his hands and must be approved by the Chief  
 25 Deputy Warden or Warden. This device may be used when an inmate is  
 on Contraband Surveillance Watch. DOM § 52050.23.4.” (ECF No. 37  
 at 8 n.2).

1 “Management Cell Status.”<sup>3</sup> (*Id.* at 8 ¶ 16). Plaintiff alleges he received  
 2 no mail, clothing, bedding or hygiene supplies except a single sheet and  
 3 pair of boxers during the seven days he remained on Management Cell  
 4 Status. (*Id.* ¶ 17).

5 On May 30, 2013, Plaintiff asked Defendant Ruiz for his mail. (*Id.*  
 6 ¶ 18). Ruiz told Plaintiff that his supervisors had prohibited Plaintiff  
 7 from receiving mail. (*Id.*). Plaintiff alleges he advised Ruiz of the  
 8 illegality of the prohibition and Ruiz called Defendant Sergeant Rivas to  
 9 talk to Plaintiff. (*Id.*). Rivas informed Plaintiff that although it was  
 10 against prison policy to withhold mail, Defendants Lieutenant Sais and  
 11 Captain Greenwood had specifically ordered it withheld from Plaintiff.  
 12 (*Id.* ¶ 19). Plaintiff claims the withheld legal mail included Superior  
 13 Court documents necessary to the prosecution of his tort action. (*Id.* ¶  
 14 20).

15 On June 7, 2013, Plaintiff received back his confiscated personal  
 16 property. (*Id.* ¶ 21). Plaintiff alleges Padilla searched his property and  
 17 stored his possessions while they were confiscated. (*Id.*). Plaintiff  
 18 claims personal documents and artwork were missing. (*Id.* at 8-9 ¶ 21).  
 19 Plaintiff claims Padilla said he had destroyed the property “for ratting  
 20 me off.” (*Id.*).

21 In response, Plaintiff filed a Form 22, which he claims Padilla  
 22 signed and dated. (*Id.* at 9 ¶ 22). Plaintiff alleges Padilla admitted to

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23 <sup>3</sup> Defendants explain “[m]anagement Cell Status is for an inmate who  
 24 persists in unduly disruptive, destructive, or dangerous behavior and  
 25 who will not heed or respond to orders and warnings to desist from such  
 activity. Cal. Code Regs. tit. 15, § 3332(f).” (ECF No. 37 at 8 at n.3).

1 destroying his property. (*Id.*). Plaintiff claims such conduct not only  
2 violates prison policy but also state and federal law. (*Id.*). Plaintiff  
3 asserts he continued to file grievances against Centinela State Prison  
4 “supervisory staff, policies and harassments” between June and  
5 September 2013. (*Id.* ¶ 23).

6 On September 5, 2013, a Classification Committee comprised of  
7 Defendants Greenwood, Sais and Warden Amy Miller placed Plaintiff  
8 for transfer. (*Id.* ¶ 24). Plaintiff claims he came before the Committee  
9 every six months since 2010, and had always been retained at Centinela  
10 due to pending state court proceedings and disciplinary adjudications.  
11 (*Id.* at 9-10 ¶ 25). Plaintiff alleges the Committee’s decision to transfer  
12 him came two weeks prior to his arraignment date in Imperial County  
13 Superior Court. (*Id.*).

14 Plaintiff claims the only difference between the prior Committee  
15 decisions and the one resulting in his transfer was his repeated filings  
16 of Form 22’s and grievances against supervisory staff, including  
17 Greenwood and Sais. (*Id.* at 10 ¶ 26). Plaintiff alleges the decision to  
18 transfer him was upheld despite his protest that the transfer would  
19 jeopardize the effectiveness of his self-representation in a criminal  
20 proceeding in state court due to a twelve-hour round trip commute  
21 between the courthouse and new prison, and the increased possibility of  
22 missing or delayed legal materials. (*Id.* ¶ 27).

23 On October 15, 2013, Plaintiff was transferred to Tehachapi State  
24 Prison’s Special Housing Unit. (*Id.* ¶ 28). Plaintiff claims prison staff  
25 failed to properly transfer his personal property resulting in a loss he

1 values at \$287.32. (*Id.*). Plaintiff does not indicate whether this  
2 estimate includes the value of the lost wedding ring which was the  
3 object of his dismissed state court case.

4 Plaintiff alleges he filed grievances over his missing property. (*Id.*  
5 at 10-11 ¶ 29). He claims Defendants Sergeant Dominguez and  
6 Associate Warden Calderon “lied on reports, made false allegations,  
7 ignored all the facts, and denied Plaintiff’s grievances.” (*Id.*). Plaintiff  
8 claims Dominguez and Calderon’s conduct was retaliation for his filing  
9 grievances against them. (*Id.* at 11). Plaintiff further alleges  
10 Dominguez filed a false report against him on September 4, 2013. (*Id.* ¶  
11 30). Plaintiff was later acquitted of the allegations in the report filed by  
12 Dominguez. (*Id.*).

13 Plaintiff asserts he was transported between prison and Imperial  
14 County Superior Court twice for criminal proceedings. (*Id.* ¶ 31).  
15 Plaintiff claims he was transported wearing Hand Isolation Devices  
16 “coupled with a black box,” and waist chains. (*Id.*). Plaintiff alleges  
17 using these devices in conjunction with each other during transport is  
18 not permitted. (*Id.*). Plaintiff claims these devices caused him such  
19 discomfort that it forced him to stop defending himself in court to avoid  
20 “this tortuous procedure.” (*Id.*).

21 After his transfer to Tehachapi State Prison, Plaintiff alleges a  
22 Centinela State Prison mail room employee John Doe once again  
23 withheld his mail for three months between December 2, 2013, and  
24 February 22, 2014. (*Id.* ¶ 32). Plaintiff does not specify whether this  
25



1 was the same Centinela State Prison mail room employee John Doe who  
2 had previously withheld Plaintiff's mail.

### 3 **III. LEGAL STANDARD**

4 "A Rule 12(b)(6) motion tests the legal sufficiency of a claim."  
5 *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). "Under Federal  
6 Rule of Civil Procedure 8(a)(2), a pleading must contain a short and  
7 plain statement of the claim showing that the pleader is entitled to  
8 relief." *Ashcroft v. Iqbal*, 556 U.S. 662, 677-78 (2009) (internal  
9 quotations omitted). The pleader must provide the Court with "more  
10 than an un-adorned, the-defendant-unlawfully-harmed-me accusation."  
11 *Iqbal*, 556 U.S. at 678 (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544,  
12 555 (2007)). "Threadbare recitals of the elements of a cause of action,  
13 supported by mere conclusory statements will not suffice." *Iqbal*, 556  
14 U.S. at 678. "Although for the purposes of a motion to dismiss [a court]  
15 must take all of the factual allegations in the complaint as true, [a court  
16 is] not bound to accept as true a legal conclusion couched as a factual  
17 allegation." *Iqbal*, 556 U.S. at 678 (internal quotations omitted).

18 On a defendant's motion to dismiss for failure to state a claim, a  
19 *pro se* pleading is construed liberally. *Thompson v. Davis*, 295 F.3d 890,  
20 895 (9th Cir. 2002) (citing *Ortez v. Washington Cnty.*, 88 F.3d 804, 807  
21 (9th Cir. 1996)). The *pro se* pleader must still set out facts in his  
22 complaint that bring his claims "across the line from conceivable to  
23 plausible." *Twombly*, 550 U.S. at 570. A court "may not supply  
24 essential elements of the claim that were not initially pled." *Ivey v. Bd.*  
25 *of Regents*, 673 F.2d 266, 268 (9th Cir. 1982).

## **IV. DISCUSSION**

### **A. Claims at Issue**

#### **1. Claim One: Access to the Courts**

Defendants challenge Plaintiff's first claim against Defendants Erece, Greenwood, Miller, Rivas, Ruiz and Sais for denial of access to the courts arising out of the withholding of Plaintiff's legal mail which resulted in the dismissal of Plaintiff's state court civil case. Defendants do not challenge Plaintiff's claims of retaliation against Defendants Greenwood, Miller and Sais arising out of his prison transfer.

#### **2. Claim Two: Right to Petition the Government for Redress of Grievances**

Defendants challenge Plaintiff's second claim only as it relates to the retaliatory conduct alleged against Defendant Gervin arising out of the interview. Defendants do not challenge the remaining allegations against Defendants Calderon, Dominguez, Greenwood, Miller, Padilla, Rivas and Sais arising out of their retaliatory interference with the prison grievance process against Plaintiff for his filing grievances against them.

#### **3. Claim Three: Due Process**

Defendants challenge Plaintiff's third claim for denial of Due Process against Defendants Calderon, Dominguez, Gervin, Miller, Padilla, and Sais arising out of the denial of law library access, interference with the grievance process, prison transfer and property deprivation. Defendants do not challenge Plaintiff's claims against

Defendants Erece, Greenwood, Rivas, Ruiz and Sais for denial of Due Process arising from the withholding of his legal mail.

#### **4. Claim Four: Retaliation**

Defendants challenge Plaintiff's fourth claim for retaliation against Defendant Gervin only. Defendants do not challenge Plaintiff's claims against Defendants Calderon, Dominguez, Erece, Greenwood, Miller, Padilla, Rivas and Sais for retaliatory conduct arising from the destruction of his property, prison transfer, withholding mail or interfering with the prison grievance process.

#### **5. Claim Five: State Law Claims**

Defendants do not challenge Plaintiff's fifth claim requesting the Court exercise supplemental jurisdiction over related state law claims.

#### **B. Claim One: Access to Courts**

Plaintiff alleges Defendants Erece, Greenwood, Rivas, Ruiz, and Sais withheld his legal mail and thereby denied Plaintiff access to the courts. (ECF No. 35 at 12 ¶¶ 34-37). Plaintiff claims his mail being withheld resulted in the dismissal of his pending state court tort case. (*Id.*). Plaintiff also alleges Defendants Greenwood, Miller and Sais transferred him in retaliation prior to his criminal proceedings in Superior Court. (*Id.*). Defendants do not challenge Plaintiff's retaliation claim arising from his transfer. (ECF No. 37 at 12 n.4).

Defendants argue Plaintiff fails to state a claim he was denied access to the courts by the withholding of his legal mail. (*Id.* at 14). Defendants contend Plaintiff fails to plead the withholding of legal mail

1 interfered with a pending criminal appeal, habeas corpus petition or  
2 civil rights action, and therefore Plaintiff's claim fails. (*Id.*).

3 A plaintiff must allege two elements to plead a civil rights  
4 violation under 42 U.S.C. § 1983: (1) violation of a right secured by the  
5 Constitution and United States law; and (2) a person acting under color  
6 of state law committed the violation. *West v. Atkins*, 487 U.S. 42, 48  
7 (1988). The First Amendment guarantees a prison inmate a limited  
8 right to send and receive mail. *Witherow v. Paff*, 52 F.3d 264, 265 (9th  
9 Cir. 1995) (citing *Thornburgh v. Abbott*, 490 U.S. 401, 407 (1989)).

10 Likewise, the First Amendment guarantees a prisoner a limited right of  
11 access to the courts. *Bounds v. Smith*, 430 U.S. 817, 822 (1977);  
12 *Phillips v. Hust*, 588 F.3d 652, 655 (9th Cir. 2009). Both rights are  
13 restricted in the prison context.

14 A prisoner's right to send and receive mail is attenuated by the  
15 prison's competing right to adopt regulations and policies "reasonably  
16 related to legitimate penological interests," including "security, order,  
17 and rehabilitation." *Whitherow*, 52 F.3d at 265 (citing *Turner v. Safley*,  
18 482 U.S. 78, 89 (1987) and *Procunier v. Martinez*, 416 U.S. 396, 413  
19 (1974)).

20 A prisoner's right of access to the courts is similarly limited.  
21 *Lewis v. Casey*, 518 U.S. 343, 354 (1996). *Lewis* imposed an actual  
22 injury requirement on prisoners claiming denial of access to the courts.  
23 *Id.* Actual injury must be alleged for any access to the courts claim  
24 because it is a jurisdictional requirement giving the plaintiff standing to  
25 bring suit. *Nevada Dep't. of Corr. v. Greene*, 648 F.3d 1014, 1018 (9th

1 Cir. 2011). A prisoner cannot satisfy the injury requirement with “any  
 2 type of frustrated legal claim.” *Id.* A plaintiff pleading denial of access  
 3 to the courts must allege interference with a direct criminal appeal,  
 4 habeas corpus petition or civil rights action. *Lewis*, 518 U.S. at 354-56.

5 The Ninth Circuit addressed claims similar to Plaintiff’s, where a  
 6 prisoner’s pending state civil litigation was dismissed for failure to  
 7 appear due to lack of transport to the courthouse from the facility in  
 8 which he was incarcerated. *See Simmons v. Sacramento Cnty. Super.*  
 9 *Ct.*, 318 F.3d 1156 (9th Cir. 2003). Following *Lewis*, *Simmons* held that  
 10 the prisoner had not stated a cognizable injury. *Id.* at 1160.

11 Plaintiff fails to plead an actual injury under *Lewis*. Plaintiff  
 12 alleges Defendants Erece, Greenwood, Rivas, Ruiz and Sais withheld  
 13 his legal mail resulting in dismissal of his pending state tort case. (ECF  
 14 No. 35 at 6 ¶¶ 7-8; 8 ¶¶ 18-19). Plaintiff does not claim his dismissed  
 15 tort case was a criminal appeal, habeas corpus petition or a civil rights  
 16 action. The Court cannot supply the missing essential allegation. *Ivey*,  
 17 673 F.2d at 268.

18 Plaintiff’s opposition cites multiple cases which hold that once a  
 19 prisoner has filed a civil action in state court prison officials may not  
 20 interfere with the prisoner’s prosecution of that action. (ECF No. 41 at  
 21 2-3). The cases Plaintiff relies on are all out-of-circuit decisions and all  
 22 except one pre-date *Lewis*, and therefore his argument fails.

23 Because Plaintiff fails to allege a legally cognizable injury  
 24 resulting from interference with a pending criminal appeal, habeas  
 25 corpus petition or civil rights case, his claim of denial of access to the

1 courts fails to the extent it is based on the grounds that interference  
 2 with his legal mail caused the dismissal of his tort case. *Lewis*, 518  
 3 U.S. at 354.

4 Accordingly, the Court **RECOMMENDS** Plaintiff's claim of denial  
 5 of access to the courts against Defendants Erece, Greenwood, Rivas,  
 6 Ruiz and Sais arising out the withholding of Plaintiff's legal mail be  
 7 **DISMISSED**. Plaintiff's claims against Defendants Greenwood, Miller  
 8 and Sais arising out of the retaliatory transfer survive this Partial  
 9 Motion to Dismiss because Defendants do not challenge this basis for  
 10 this claim.

11 **C. Claim Two: Right to Petition the Government for**  
 12 **Redress of Grievances and Claim Four: Retaliation**

13 In his second and fourth causes of action, Plaintiff alleges  
 14 Defendant Gervin engaged in retaliatory conduct against him and  
 15 interfered with his right to petition the courts for redress of grievances.  
 16 (ECF No. 35 at 18 ¶¶ 40, 50). Plaintiff alleges Gervin filed a false  
 17 report against him and verbally abused him during his interview. (*Id.*  
 18 at 18 ¶ 59). Plaintiff claims Gervin's retaliatory conduct was to  
 19 dissuade him from using the grievance process. (*Id.* at 13 ¶ 40).  
 20 Defendants challenge Plaintiff's second and fourth claims only as to the  
 21 allegations of retaliatory conduct against Defendant Gervin.<sup>4</sup> (ECF No.  
 22 37 at 14).

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24 <sup>4</sup> Defendants do not challenge Plaintiff's claims against Defendants  
 25 Calderon, Dominguez, Erece, Greenwood, Miller, Padilla, Rivas and  
 Sais for retaliatory conduct arising from the destruction of his property,

1 Defendants argue Plaintiff fails to state a claim against Gervin for  
 2 retaliation and fails to sufficiently allege he was engaged in protected  
 3 conduct giving rise to a retaliation claim against Gervin. (ECF No. 37  
 4 at 15).

5 “In the First Amendment context . . . a prisoner retains those First  
 6 Amendment rights that are not inconsistent with his status as a  
 7 prisoner or with the legitimate penological interests of the corrections  
 8 system.” *Pell v. Procunier*, 417 U.S. 817, 822 (1974). Prisoners retain  
 9 the right to file prison grievances and pursue civil rights litigation.  
 10 *Rhodes v. Robinson*, 408 F.3d 559, 567 (9th Cir. 2005) *amended on other*  
 11 *grounds by Rhodes v. Robinson*, 408 F.3d 559 (9th Cir. 2005) (*reh’g*  
 12 *denied*). “Deliberate retaliation by state actors against an individual’s  
 13 exercise of this right is actionable under section 1983.” *Soranno’s Gasco*  
 14 *v. Morgan*, 874 F.2d 1310, 1314 (9th Cir. 1989).

15 A plaintiff must plead five basic elements to state a claim for  
 16 retaliation under § 1983:

17 (1) a state actor took an adverse action against him (2)  
 18 because of (3) the prisoner’s protected conduct, and that the  
 19 action taken against him (4) chilled the prisoner’s exercise of  
 20 his First Amendment Rights and (5) did not reasonably  
 advance a legitimate correctional goal.

21 *Silva v. Di Vittorio*, 658 F.3d 1090, 1104 (9th Cir. 2011) (quoting  
 22 *Rhodes*, 408 F.3d at 567).

23  
 24  
 25 prison transfer, withholding mail or interfering with the prison  
 grievance process.



1 Plaintiff adequately alleges Gervin is both a state actor and took  
 2 adverse action against him, and that he did so to dissuade Plaintiff from  
 3 exercising his First Amendment rights. (ECF No. 35 at 5 ¶¶ 1, 5; 13 ¶  
 4 40; 18 ¶ 60). Plaintiff fails to allege, however, that Gervin's conduct did  
 5 not reasonably advance a legitimate correctional goal. Because Plaintiff  
 6 fails to allege this essential element, his retaliation claim fails.

7 Plaintiff offers a declaration with additional allegations in his  
 8 opposition. (ECF No. 41). The Court cannot consider the declaration as  
 9 complaint allegations, but can consider the declaration in deciding  
 10 whether leave to amend should be granted. *Broam v. Bogan*, 320 F.3d  
 11 1023, 1026 n.2 (9th Cir. 2003). The declaration fails to cure the  
 12 aforementioned deficiency. (ECF No. 41). While Plaintiff reiterates  
 13 that Gervin's conduct was retaliatory and undertaken to discourage him  
 14 from using the grievance process, he again fails to allege that Gervin's  
 15 conduct did not advance a legitimate correctional goal. (*Id.* at 5-7).

16 Accordingly, the Court **RECOMMENDS** Plaintiff's second and  
 17 fourth causes of action be **DISMISSED** as to Defendant Gervin.  
 18 Plaintiff's retaliation and right to petition the government for redress of  
 19 grievances claims against Defendants Calderon, Dominguez, Erece,  
 20 Greenwood, Miller, Padilla, Rivas and Sais survive this Partial Motion  
 21 to Dismiss because Defendants do not challenge these claims against  
 22 these Defendants.

### 23 **D. Claim Three: Due Process**

24 In his third claim, Plaintiff alleges Defendant Padilla denied him  
 25 access to the prison law library, failed to notify supervisors of his



1 grievances and destroyed Plaintiff's property in retaliation for  
 2 exercising his First and Fourteenth Amendment rights. (ECF No. 35 at  
 3 ¶ 46). Plaintiff also asserts Defendants Calderon, Dominguez and  
 4 Gervin violated his Due Process rights by cancelling and denying his  
 5 grievances. (*Id.* ¶¶ 47-49). Plaintiff further alleges Defendants  
 6 Greenwood, Miller and Sais transferred him prior to his criminal  
 7 proceedings, thereby violating his Due Process rights. (*Id.* at 16 ¶ 51).

8 Defendants argue Plaintiff's Due Process claim fails as a matter of  
 9 law because he fails to plead a liberty interest in either the prison  
 10 grievance process or in his prison transfer. (ECF No. 37 at 15).  
 11 Defendants further argue Plaintiff cannot state a Due Process claim for  
 12 lost property under § 1983. (*Id.*).

13 “[The] range of interests protected by procedural due process is  
 14 not infinite . . . . Due Process is required only when a decision of the  
 15 State implicates an interest within the protection of the Fourteenth  
 16 Amendment.” *Ingraham v. Wright*, 430 U.S. 651, 672 (1977) (citing *Bd.*  
 17 *of Regents v. Roth*, 408 U.S. 564, 570 (1972)). A prisoner “has no  
 18 legitimate claim of entitlement to a grievance procedure.” *Mann v.*  
 19 *Adams*, 855 F.2d 639, 640 (9th Cir. 1988) (*reh'g denied*).

### 20 **1. Prison Law Library Access**

21 Plaintiff claims denial of prison law library access as part of his  
 22 third claim for violation of his Due Process rights. (ECF No. 35 at 15 ¶  
 23 46). Plaintiff alleges Defendant Padilla denied him Due Process by  
 24 refusing to grant him prison law library access while his state tort case  
 25 was pending. (ECF No. 35 at 15 ¶ 46). Defendants argue that Plaintiff

1 fails to plead actual injury arising from the denial of access to the  
2 prison law library and therefore Plaintiff's claim fails. (ECF No. 37 at  
3 12).

4 The affirmative protections of the Fourteenth Amendment do not  
5 extend beyond the ability of a prisoner to file a petition or complaint.  
6 *Wolff v. McDonnell*, 418 U.S. 539, 576 (1974). The right to access the  
7 courts "guarantees no particular methodology but rather a conferral of a  
8 capability—the capability of bringing contemplated challenges to  
9 sentences or conditions of confinement before the courts." *Lewis*, 518  
10 U.S. at 356.

11 Prisoners do not have a constitutional guarantee to unlimited law  
12 library access. *Lindquist v. Idaho State Bd. of Corr.*, 776 F.2d 851, 858  
13 (9th Cir. 1985). Prison officials have discretion in choosing how to  
14 regulate the time, manner and place in which a law library can be used.  
15 *Id.* Prisons are only required to provide law library access that meets  
16 minimum constitutional standards. *Sands v. Lewis*, 886 F.2d 1166,  
17 1169 (9th Cir. 1989) *overruled on other grounds by* *Silva v. Di Vittorio*,  
18 658 F.3d 1090 (9th Cir. 2011).

19 A plaintiff must satisfy two essential elements to establish a  
20 constitutional violation arising from denial of law library access:

21 First, he must show that the access was so limited as to be  
22 unreasonable. Second, he must show that the inadequate  
23 access caused him actual injury, *i.e.*, show a "specific  
24 instance in which [he] was actually denied access to the  
25 courts."

1 *Vandelft v. Moses*, 31 F.3d 794, 797 (9th Cir. 1994) (internal citations  
2 omitted). As explained earlier, *Lewis* further defined “actual injury” to  
3 mean interference with a prisoner’s ability to bring a direct criminal  
4 appeal, habeas corpus petition or civil rights action. *Id.* at 354-356.

5 Plaintiff alleges Defendant Padilla denied him law library access  
6 although Plaintiff had “Priority Library User” status due to his pending  
7 state tort case. (ECF No. 35 at 6 ¶¶ 9, 10). Plaintiff alleges this status  
8 gave him an extra two hours of library time per week above the  
9 minimum two hours afforded to inmates. (*Id.* at ¶ 9). Plaintiff claims  
10 he made daily attempts to gain library access from May 17, 2013, to  
11 May 24, 2013. (*Id.* at 7-8 ¶¶ 10, 11). On May 29, 2013, Plaintiff was  
12 placed on “Management Cell Status” because he had kept his thermal  
13 trays and Hand Isolation Devices in attempts to attract supervisor  
14 attention. (*Id.* ¶¶ 11-16). Plaintiff claims Defendant Greenwood  
15 “promptly” rectified his library access issues when he was notified. (*Id.*  
16 ¶ 14).

17 Plaintiff fails to state a claim for denial of access to the courts  
18 arising out of the denial of law library access. Plaintiff makes no  
19 showing of how the denial of access was unreasonable beyond alleging  
20 he was denied access during his Priority Library Use status. Plaintiff  
21 does not allege how the denial of access to the prison law library  
22 affected his state tort case. Plaintiff also does not allege the denial of  
23 access prevented him from filing a challenge to his conviction or  
24 conditions of his confinement. Rather, Plaintiff alleges he was not  
25 allowed to make use of extra allotted time under prison rules. Such an

1 allegation is insufficient to state a claim for denial of access to the  
 2 courts. A prisoner's ability to file challenges to his conviction or  
 3 conditions of confinement is the touchstone of his constitutional right to  
 4 access the courts not his ability to turn pages in a prison law library.  
 5 *Lewis*, 518 U.S. at 356-357. Plaintiff's claim fails because he neither  
 6 shows that the denial of library access was unreasonable nor pleads an  
 7 actual injury to a challenge to his conviction or conditions of  
 8 confinement.

9 Accordingly, the Court **RECOMMENDS** Defendants' Partial  
 10 Motion to Dismiss Plaintiff's third claim for denial of Due Process  
 11 against Defendant Padilla arising from the denial of prison library  
 12 access be **GRANTED**. Plaintiff's claims of retaliation against Padilla  
 13 for destroying his property survive this Partial Motion to Dismiss  
 14 because Defendants do not challenge this claim on this basis.

## 15 **2. Grievance Process**

16 Plaintiff alleges Defendants Calderon, Dominguez, Gervin and  
 17 Padilla violated his Due Process rights by failing to notify supervisors of  
 18 grievances, and by denying and cancelling his grievances. (ECF No. 35  
 19 at 15 ¶¶ 46, 48, 49). Defendants argue Plaintiff's claims fail as a matter  
 20 of law because Plaintiff does not have a constitutionally recognized  
 21 liberty interest in the prison grievance process. (ECF No. 37 at 12).

22 It is well established that state prisoners do not have a recognized  
 23 liberty interest in prison grievance procedures. *See Ramirez v. Galaza*,  
 24 334 F.3d 850, 860 (9th Cir. 2003) (holding failure of prison officials to  
 25 properly implement administrative appeals process in the prison does

1 not give rise to constitutional concerns); *Mann*, 855 F.2d at 640 (stating  
2 a prisoner has “no legitimate claim of entitlement to a grievance  
3 procedure” thus no protected liberty interest exists).

4 Plaintiff’s claim fails as a matter of law because he does not have  
5 a protected liberty interest in the prison grievance process. *Id.*  
6 Accordingly, the Court **RECOMMENDS** Defendants’ Partial Motion to  
7 Dismiss Plaintiff’s third claim for violation of Due Process against  
8 Defendants Padilla, Gervin, Calderon and Dominguez be **GRANTED** to  
9 the extent it rests on the denial and cancellation of his grievances.

### 10 **3. Transfer**

11 Plaintiff alleges Defendants Greenwood, Miller and Sais violated  
12 his Due Process rights by transferring him to Tehachapi State Prison.  
13 (ECF No. 35 at 16 ¶ 51). Defendants argue Plaintiff does not have a  
14 liberty interest in avoiding transfer to another prison and therefore  
15 cannot state a claim for denial of Due Process. (ECF No. 37 at 16).

16 Prisoners do not have a liberty interest in remaining at a  
17 particular prison because Due Process does not protect prisoners from  
18 transfer between prisons. *Meachum v. Fano*, 427 U.S. 215, 224 (1976).  
19 A prisoner has no reasonable expectation he will serve his entire  
20 sentence at the same prison. *Olim v. Wakinekona*, 461 U.S. 238, 248  
21 (1983). Plaintiff therefore fails to state a claim that his prison transfer  
22 violated his Due Process rights.

23 Accordingly, the Court **RECOMMENDS** Defendants’ Partial  
24 Motion to Dismiss Defendants Greenwood, Miller and Sais be  
25 **GRANTED** as to Plaintiff’s Due Process claims against them arising

1 from his prison transfer. Plaintiff's retaliation claims against  
 2 Defendants Greenwood, Miller and Sais arising out of his transfer  
 3 survive this Partial Motion to Dismiss because Defendants do not  
 4 challenge this claim on this basis.

#### 5 **4. Property Deprivation**

6 Plaintiff alleges Defendant Padilla deprived him of his personal  
 7 property without Due Process. (ECF No. 35 at 15 ¶ 46). Plaintiff does  
 8 not allege Padilla was authorized to do so, but does allege Padilla's  
 9 conduct was intentional. (*Id.* at 8-9 ¶ 21). Plaintiff does not allege  
 10 California state remedies are inadequate or unavailable.

11 "[A]n unauthorized intentional deprivation of property by a state  
 12 employee does not constitute a violation of the procedural requirements  
 13 of the Due Process Clause [] if a meaningful postdeprivation remedy for  
 14 the loss is available." *Hudson v. Palmer*, 468 U.S. 517, 533 (1984); *see*  
 15 *Hendon v. Ramsey*, 528 F.Supp. 2d 1058, 1067 (9th Cir. 2007). A state  
 16 can cure an otherwise unconstitutional property deprivation by  
 17 providing an adequate postdeprivation remedy. *Zimmerman v. City of*  
 18 *Oakland*, 255 F.3d 734, 737 (9th Cir. 2001). California provides a  
 19 remedial scheme for property deprivations committed by state  
 20 employees. *Barnett v. Centoni*, 31 F.3d 813, 816-817 (9th Cir. 1994).  
 21 The California Tort Claims Act is "an adequate post-deprivation  
 22 remedy." *Id.*; *see* CAL. GOV. CODE §§ 810-895. The possibility "[a  
 23 prisoner] might not be able to recover under these remedies the full  
 24 amount which he might receive in a § 1983 action is not . . .

determinative of the adequacy of the state remedies.” *Hudson*, 468 U.S. at 535.

Plaintiff fails to state a claim for deprivation of Due Process under § 1983 arising from Padilla’s destruction of his personal property. *Hudson*, 468 U.S. at 533. Plaintiff’s appropriate remedy for the loss of the property lies in a state proceeding pursuant to the California Tort Claims Act. CAL. GOV. CODE §§ 810-895; *Barnett*, 31 F.3d at 816-817; *Manson, Iver & York v. Black*, 176 Cal. App. 4th 36, 42 (2009); *Talley v. Valuation Counselors Grp., Inc.*, 191 Cal. App. 4th 132, 146 (2010).

Plaintiff may pursue redress for his previously dismissed state court case No. ECV70335 through filing a motion in California court to set aside the judgment. CAL. CODE CIV. PROC. § 473(b); *Manson*, 176 Cal. App. 4th at 42; *Talley*, 191 Cal. App. 4th at 146. Because Plaintiff’s remedies lie in California law, he should pursue those remedies “in state court rather than seeking a remedy under section 1983 in federal court.” *Smith v. Cnty. of Santa Cruz*, No. 13-cv-00595, 2014 U.S. Dist. LEXIS 101054, at \*n.10, 2014 WL 3615492 (N.D. Cal. July 22, 2014).

Accordingly, the Court **RECOMMENDS** Defendants’ Partial Motion to Dismiss Plaintiff’s Due Process claim arising from the deprivation of his property by Defendant Padilla be **DISMISSED**. Plaintiff’s retaliation claim against Defendant Padilla arising out of his property deprivation survives this Partial Motion to Dismiss because Defendants do not challenge this claim on this basis.

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## **D. QUALIFIED IMMUNITY**

Plaintiff alleges violations of his First and Fourteenth Amendment rights in claims one and three. (ECF No. 35). Defendants raise qualified immunity as an alternative basis for dismissal of claims one and three. (ECF No. 37 at 17).

Qualified immunity shields government employees from personal liability when sued in their individual capacities for acts committed in the course of their official duties. *Cnty. House, Inc. v. City of Boise*, 623 F.3d 945, 964 (9th Cir. 2010). “A government official sued under § 1983 is entitled to qualified immunity unless the official violated a statutory or constitutional right that was clearly established at the time of the challenged conduct.” *Carroll v. Carman*, 135 S.Ct. 348, 350 (2014).

Qualified immunity is a two pronged inquiry: (1) did the defendant’s actions violate the plaintiff’s constitutional rights; and (2) if so, were the constitutional rights violated by the defendant’s conduct clearly established at the time of the violation. *Saucier v. Katz*, 533 U.S. 194, 201 (2001). The sequence prescribed in *Saucier* is not mandatory; a court has discretion which question to resolve first. *Pearson v. Callahan*, 555 U.S. 223, 236 (2009). A “clearly established right” is one that is sufficiently clear so that a reasonable officer would know that his conduct would violate that right. *Carroll*, 135 S.Ct. at 350 (citing *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). “[E]xisting precedent must have placed the statutory or constitutional question beyond debate.” *Ashcroft v. al-Kidd*, 131 S.Ct. 2074, 2083 (2011). If a plaintiff fails to satisfy both prongs then qualified immunity attaches to the



1 defendant official. *Saucier*, 533 U.S. at 201. The inquiry goes no  
2 further if a court determines no constitutional right was violated.  
3 *Aguilera v. Baca*, 510 F.3d 1161, 1167 (9th Cir. 2007).

4 Defendants are entitled to qualified immunity on claims one and  
5 three to the extent those claims are based on denial of access the courts,  
6 interference with the grievance process and the prison transfer.  
7 Plaintiff does not have a constitutional right to litigate civil claims  
8 unrelated to direct criminal appeals, habeas corpus petitions or civil  
9 rights litigation. *Lewis*, 518 U.S. at 354-356. Plaintiff likewise does not  
10 have a constitutionally recognized liberty interest in the prison  
11 grievance process or in avoiding transfer between prisons. *Ramirez*,  
12 334 F.3d at 860; *Meachum*, 427 U.S. at 224. Because Plaintiff has not  
13 established Defendants' conduct violated a clearly established  
14 constitutional right in claims one and three, the inquiry ends and  
15 qualified immunity attaches. *Saucier*, 533 U.S. at 236; *Aguilera*, 510  
16 F.3d at 1167.

17 The Court **RECOMMENDS** finding that Defendants are entitled  
18 to qualified immunity on claims one and three to the extent those  
19 claims are predicated upon Plaintiff's claims for denial of access to the  
20 courts, the denial and cancellation of his grievances and prison transfer.

21 Accordingly, this Court **RECOMMENDS** Defendants Calderon,  
22 Dominguez, Erece, Greenwood, Miller, Rivas, Ruiz and Sais are entitled  
23 to qualified immunity on Plaintiff's first and third causes of action and  
24 be **DISMISSED** from those claims. Claims one and three survive this  
25 Partial Motion to Dismiss as to the Due Process claims for withholding

1 Plaintiff's legal mail against Defendants Erece, Greenwood, Rivas, Ruiz  
 2 and Sais, and Plaintiff's retaliation claims against all Defendants  
 3 except Gervin.

#### 4 **V. CONCLUSION**

5 For the foregoing reasons, **IT IS HEREBY RECOMMENDED**  
 6 that the District Court issue an Order: (1) Approving and Adopting this  
 7 Report and Recommendation; (2) **GRANTING** Defendants' Partial  
 8 Motion to Dismiss; and (3) **DISMISSING**:

- 9 • Plaintiff's first claim for denial of access to the courts against  
 10 Defendants Erece, Greenwood, Miller, Rivas, Ruiz and Sais  
 11 arising out of the withholding of Plaintiff's legal mail which  
 12 resulted in the dismissal of Plaintiff's state court tort case;
- 13 • Plaintiff's second and fourth claims against Defendant Gervin for  
 14 retaliation arising out of the interview; and
- 15 • Plaintiff's third claim for denial of Due Process against  
 16 Defendants Calderon, Dominguez, Gervin, Miller, Padilla and Sais  
 17 and arising out of the denial of law library access, denial and  
 18 cancellation of grievances, property deprivation and prison  
 19 transfer.

20 If the Court's recommendations are adopted, the following claims  
 21 remain **PENDING**:

- 22 • Plaintiff's second claim for denial of the right to petition the  
 23 government for redress of grievances against Defendants  
 24 Calderon, Dominguez, Greenwood, Miller, Padilla, Rivas and Sais  
 25 arising from interference with the prison grievance process;


- 1 • Plaintiff's third claim for violation of Due Process against
- 2 Defendants Erece, Greenwood, Ruiz and Sais arising from the
- 3 withholding of Plaintiff's legal mail;
- 4 • Plaintiff's fourth claim for retaliation against all Defendants,
- 5 except Gervin, arising from the deprivation of Plaintiff's property,
- 6 transfer to Tehachapi State Prison, withholding Plaintiff's legal
- 7 mail and filing false allegations and reports against Plaintiff; and
- 8 • Plaintiff's fifth claim requesting the Court exercise supplemental
- 9 jurisdiction over related state law claims.

10 **IT IS HEREBY ORDERED** that any written objections to this  
 11 Report must be filed with the Court and served on all parties no later  
 12 than **October 30, 2015**. The document should be captioned "Objections  
 13 to Report and Recommendation."

14 **IT IS FURTHER ORDERED** that any reply to the objection  
 15 shall be filed with the Court and served on all parties no later than  
 16 **November 6, 2015**. The parties are advised that the failure to file  
 17 objections within the specified time may waive the right to raise those  
 18 objections on appeal of the Court's order. *See Turner v. Duncan*, 158  
 19 F.3d 449, 455 (9th Cir. 1998).

20 **IT IS SO ORDERED.**

21  
 22 Dated: October 7, 2015

  
 Hon. Mitchell D. Dembin  
 United States Magistrate Judge